

DISSENTING OPINION OF COMMISSIONER ROBERT O. TIERNAN  
TO ADVISORY OPINION 1975-33

"Rose is a rose is a rose is a rose." Advisory Opinions of the Federal Election Commission, on the other hand, have neither the beauty nor the self-definition of Ms. Stein's flower. Advisory opinions are meant to inform and give unambiguous guidance; the aesthetic qualities of AO 1975-33 notwithstanding, I am most concerned that this advisory opinion fails to make a clear statement upon which appropriate acts of voluntary compliance may be predicated. In order to offer some words of amplification, I dissent.

In Advisory Opinion 1975-33, the Commission has stated that the twenty percent fundraising exemption of 18 U.S.C. §591(f)(4)(H) need not be prorated on a state by state basis as long as the funds are being raised for the candidate's overall, national campaign. I agree wholeheartedly with this position. However, the Commission has also stated that "in those instances where the fundraising efforts are aimed at particular states and are undertaken in those states within close proximity of upcoming primary elections, the presumption is made that those efforts must be prorated and attributed to the candidate's primary efforts in those particular states."

I also agree with this latter statement, but feel that the exception rests on the distinction between "fundraising" and "campaigning". This distinction must be more accurately described, and the meaning of the term "within close proximity" more precisely drawn.

First, it is my view that where a candidate's effort is focused on one or more primary states - such as New Hampshire, Massachusetts, or the New England region - within 28 days of the presidential primary election, such efforts are not fundamentally "fundraising". Instead, such direct mailings, rallies, television and radio appeals, and the like, are primarily campaign efforts made for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention or a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States. These expenditures should therefore be attributed to the candidate's primary effort.

Second, in the Commission's discussion of Advisory Opinion 1975-33 at their public meeting of December 23, 1975, reference was made to 39 U.S.C. §3210(a)(5)(D) as a good rule of thumb for the meaning of "within close proximity" of upcoming primary elections. This section prohibits Members of Congress from sending out any mass mailings of newsletters or the like under

the frank less than 28 days before a primary or general election. The presumption in this prohibition is that any mass mailings in this period would be for the purpose of influencing the election. In further discussion, the Commission indicated that any presidential candidate, who phoned or wrote the Commission requesting guidance as to the meaning of "within close proximity" in Advisory Opinion 1975-33, would be referred to 39 U.S.C. §3210(a)(5)(D).

A letter or a phone inquiry should not be required to obtain such a reference and clarification of the meaning of "within close proximity". This advisory opinion should state that a good rule of thumb is that any mass mailings or the like aimed at particular primary states less than 28 days before the election are "within close proximity" of upcoming primary elections and therefore are attributable campaign expenditures.

Robert Tiernan  
Commissioner for the  
Federal Election Commission